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DGADE of Delaware, LLC, Namco 8, LLC, Bunherst, LLC,
and Wishlab 90, LLC

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

In re: NAMCO CAPITAL GROUP,
INC., a California corporation,

Debtor.

BRADLEY D. SHARP, solely in his
capacity as Chapter 11 Trustee of
NAMCO CAPITAL GROUP, INC.,

Plaintiff,

vs.

MOUSA NAMVAR, et al.,

Defendants.

Case No.: 2:11-cv-05320-GAF

Bankr. Case No.: 2:08-bk-32333-BR
Bankr. Adv. Proc. No.: 2:10-ap-02945-BR

Chapter 11

**NOTICE OF MOTION AND MOTION
IN LIMINE OF DEFENDANTS MOUSA
NAMVAR, MAGDIEL, LLC, NAMCO
8, LLC, WISHLAB 90, LLC,
BUNHERST, LLC, AND DGADE OF
DELAWARE, LLC TO EXCLUDE
DOCUMENTS NOT TIMELY
PRODUCED IN DISCOVERY AND
DEPOSITION TESTIMONY
REGARDING SUCH DOCUMENTS
FROM INTRODUCTION AT TRIAL
BY PLAINTIFF; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

[Request for Judicial Notice, Lori L.
Werderitch Declaration, and [Proposed]
Order Submitted Concurrently Herewith]

Date: October 21, 2013

Time: 9:30 a.m.

Place: Courtroom 740

Complaint Filed: October 26, 2010

Trial Date: October 29, 2013

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**NOTICE OF MOTION AND MOTION
TO EXCLUDE DOCUMENTS NOT
PRODUCED IN DISCOVERY**

TO PLAINTIFF BRADLEY D. SHARP, CHAPTER 11 TRUSTEE OF NAMCO CAPITAL GROUP, INC., AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 21, 2013 at 9:30 a.m., or as soon thereafter as the parties may be heard, in Courtroom 740 of the above-entitled Court, located at 255 East Temple St., Los Angeles, California 90012, Defendants Mousa Namvar, Magdiel, LLC, DGADE of Delaware, LLC, Namco 8, LLC, Bunherst, LLC, and Wishlab 90, LLC (collectively, the “Mousa Defendants”) will and hereby do move the Court for an order excluding documents not timely produced in discovery and any deposition testimony of the Mousa Defendants concerning such documents from being introduced into evidence at trial by Plaintiff Bradley D. Sharp’s, Chapter 11 Trustee of Namco Capital Group, Inc. (“Plaintiff”). This includes documents identified on the parties’ Joint Exhibit List as Exhibits Nos. 42, 43, 48, 49, 50, 156, 165, 166, 167, 257, 284, 285, 286, 296, 303, 304, 457, 878, 879, and 975.

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the accompanying Declaration of Lori L. Werderitch and Request for Judicial Notice, and all supporting evidence filed concurrently herewith, all of the records, pleadings and papers on file in this action, and upon such further oral or documentary evidence as may be presented at or before the hearing on this Motion.

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1 Pursuant to L.R. 7-3, the parties met and conferred regarding the motion on July
2 12, 2013.

3 DATED: September 23, 2013

Respectfully submitted,

4 GREENBEG GLUSKER FIELDS
5 CLAMAN & MACHTINGER, LLP

6 By: /s/ Lori L. Werderitch.

7 BRIAN L. DAVIDOFF

8 BERNARD M. RESSER

9 LORI L. WERDERITCH

10 Attorneys for Defendants Mousa Namvar,
11 Magdiel, LLC, DGADE of Delaware, LLC,
12 Namco 8, LLC, Bunherst, LLC, and
13 Wishlab 90, LLC
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants Mousa Namvar, Magdiel, LLC, DGADE of Delaware, LLC, Namco 8, LLC, Bunherst, LLC, and Wishlab 90, LLC (collectively, the “Mousa Defendants”) move to preclude Plaintiff Bradley D. Sharp’s, Chapter 11 Trustee of Namco Capital Group, Inc. (“Plaintiff”) from introducing at trial and/or relying on documents that were not timely produced by Plaintiff in connection with its required disclosures or in response to the Mousa Defendants’ discovery requests and from introducing any deposition testimony of the Mousa Defendants concerning such documents.

Throughout this litigation, Plaintiff has made a mockery of the disclosure and discovery requirements that are fundamental to the orderly process of litigation in this District and the federal system by repeatedly introducing at depositions documents it failed to timely produce or properly disclose during discovery. The Mousa Defendants will incur substantial prejudice given their inability to properly prepare for the use of the document during depositions. To prevent prejudice to the Mousa Defendants, Plaintiff should not be permitted to use at trial any documents it did not timely or properly disclose and any deposition testimony concerning such documents.

Had the Mousa Defendants been timely given the withheld documents and information, they would have been able to question Plaintiff’s witnesses about them, and would have been able to conduct additional written discovery based on them. Instead, Plaintiff’s obstructionist tactics prevented the Mousa Defendants from taking necessary discovery in this case.

It would be fundamentally unfair if Plaintiff were permitted to withhold documents and information throughout the entire course of the litigation only to be permitted to produce it now and freely use it at trial or spring in on witnesses at their

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1 depositions and fire questions at them without having produced the document in
2 discovery.

3 It is this element of gamesmanship and surprise that the Federal Rules were
4 specifically designed to protect against. These rules demand that the Court preclude
5 parties that fail to make or supplement initial disclosures from presenting at trial any
6 evidence not so disclosed, unless there is substantial justification or the failure to
7 disclose is harmless.

8 As will be discussed below, Plaintiff was not substantially justified in refusing
9 to make disclosures or produce documents in discovery and the harm to the Mousa
10 Defendants is great. The Court should preclude Plaintiff from introducing any and all
11 documents that it did not timely disclose, including, but not necessarily limited to,
12 Exhibit Nos. 42, 43, 48, 49, 50, 156, 165, 166, 167, 257, 284, 285, 286, 296, 303, 304,
13 457, 878, 879, and 975 in the parties' Joint Exhibit List and from introducing any
14 deposition testimony of the Mousa Defendants concerning such documents.

15 **II. FACTUAL BACKGROUND**

16 **A. The First Amended Complaint and Scheduling Order.**

17 Namco Capital Group, Inc. ("Namco") entered bankruptcy via an involuntary
18 petition on December 22, 2008. Soon thereafter, plaintiff Bradley D. Sharp (the
19 "Trustee" or "Plaintiff") was appointed as Chapter 11 Trustee of Namco.

20 The Trustee spent more than two years and many millions of dollars
21 investigating the collapse of Namco and pursuing alleged creditors to recoup Namco
22 losses. As part of that effort, the Trustee filed the First Amended Complaint ("FAC")
23 herein alleging that the Mousa Defendants are the creditors of Namco, are alter-egos
24 of one another, and are responsible for damages incurred by Namco in connection
25 with various real estate deals and monetary transfers. *See* Request for Judicial Notice
26 ("RJN") filed concurrently herewith at ¶1.

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1 On June 25, 2012, the Court issued its Rule 16 Scheduling Order, setting the
 2 discovery cut-off in this case for July 26, 2013. RJN ¶2. The Scheduling Order was
 3 later modified for the purposes of taking a handful of specific depositions only. RJN
 4 ¶3.

5 **B. Plaintiff's Use of Documents Not Produced In Discovery During**
 6 **Depositions.**

7 The Mousa Defendants received from Plaintiff rolling document productions
 8 from early in the case through May 2013. Declaration of Lori L. Werderitch filed
 9 concurrently herewith ("Werderitch Dec.") at ¶2. The parties scheduled various
 10 witness depositions throughout the month of July. *Id.* at ¶3. During deposition,
 11 Plaintiff introduced exhibits that were not Bates numbered and had also not been
 12 produced by the Mousa Defendants, or any other party, herein. *Id.* at ¶¶3-6. In
 13 addition, several of Plaintiff's proposed exhibits on the parties' Joint Exhibit List are
 14 not Bates numbered and were not been produced by Plaintiff, the Mousa Defendants,
 15 or any other party, herein during the discovery process. *Id.* at ¶7.

16 **C. The Parties' Efforts to Meet and Confer.**

17 Given the prejudice to the Mousa Defendants presented by the use of
 18 undisclosed documents during deposition (and potentially later at trial), counsel for
 19 the Mousa Defendants' requested a meet and confer conference concerning the Mousa
 20 Defendants' intention to exclude such documents at trial. **Exhibit A** to Werderitch
 21 Dec. at ¶8. On July 12, 2013, counsel participated in a personal meet and confer
 22 wherein the parties came to an agreement not to introduce any additional non-Bates
 23 labeled documents at future depositions, but Plaintiff continued to do so in violation
 24 of that agreement thereby necessitating the filing of the motion to avoid prejudice.
 25 Werderitch Dec. at ¶¶8-9.

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1 **III. PLAINTIFF’S FAILURE TO PRODUCE DOCUMENTS IN**
 2 **DISCLOSURES AND/OR DISCOVERY PRECLUDES USE OF SUCH**
 3 **DOCUMENTS AT TRIAL**

4 The Federal Rules of Civil Procedure are clear with respect to the sanctions
 5 imposed upon a party that fails to comply with disclosure requirements, including the
 6 Rule that imposes the continuing obligation on a party to supplement its initial
 7 disclosures and discovery responses:

8 Failure to Disclose or Supplement. If a party fails to provide
 9 information or identify a witness as required by Rule 26(a)
 10 or 26(e), the party is not allowed to use that information or
 11 witness to supply evidence on a motion, at a hearing, or at a
 12 trial, unless the failure was substantially justified or is
 13 harmless. In addition to or instead of this sanction, the
 14 court, on motion and after giving an opportunity to be heard:
 15 (A) may order payment of the reasonable expenses,
 16 including attorney’s fees, caused by the failure;
 (B) may inform the jury of the party’s failure; and
 (C) may impose other appropriate sanctions, including any
 of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

17 *See* Fed. R. Civ. Proc. 37(c)(1).

18 This is a “self-executing,” “automatic” sanction, which “provides a strong
 19 inducement for disclosure of material that the disclosing party would expect to use as
 20 evidence.” *See* Advisory Committee Notes on 1993 Amendment to Federal Rule of
 21 Civil Procedure Rule 37(c)(1); *see also Yeti By Molly, Ltd. v. Deckers Outdoor Corp.*
 22 (9th Cir. 2001) 259 F.3d 1101, 1106 (citing same).

23 The Court need not make any finding of willfulness or bad faith to exclude
 24 Plaintiff from presenting evidence under this rule. “The implementation of the
 25 sanction is appropriate even when a litigant’s entire cause of action will be
 26 precluded.” *Hoffman v. Construction Protective Services, Inc.* (9th Cir. 2008) 541
 27 F.3d 1175, 1180 (internal citations omitted).

1 The party facing sanctions (not the party seeking sanctions) has the burden of
2 proving its failure to comply with Rule 26 was “substantially justified” or “harmless.”
3 *Yeti By Molly, supra*, 259 F.3d at 1106. Unless Plaintiff can meet the required burden
4 showing that the failure to disclose was either substantially justified or harmless,
5 Plaintiff must be precluded from using the previously undisclosed information at trial.
6 *Cambridge Electronics Corp. v. MGA Electronics, Inc.* (C.D. Cal. 2004) 227 F.R.D.
7 313, 320-21 (“Excluding evidence at trial as a sanction for failure to disclose under
8 Rule 26(e)(2) in a timely fashion is ‘automatic and mandatory’ unless the party can
9 show the violation is either justified or harmless.”).

10 It would be manifestly unfair to the Mousa Defendants’ defense if Plaintiff
11 were permitted to withhold documents throughout the entire course of litigation only
12 to be allowed to freely use them and deposition testimony about them at trial.
13 Plaintiff therefore needs to be precluded from introducing at trial any and all
14 documents not previously produced during discovery and/or disclosures and from
15 introducing any deposition testimony of the Mousa Defendants concerning such
16 documents.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Mousa Defendants respectfully request an order
3 precluding Plaintiff from introducing at trial, and/or relying at trial on, documents that
4 Plaintiff failed to timely produce during discovery and disclosures and from
5 introducing any deposition testimony of the Mousa Defendants concerning such
6 documents.

7
8 DATED: September 23, 2013

Respectfully submitted,

9 GREENBEG GLUSKER FIELDS
10 CLAMAN & MACHTINGER, LLP

11 By: /s/ Lori L. Werderitch.

12 BRIAN L. DAVIDOFF
13 BERNARD M. RESSER
14 LORI L. WERDERITCH

Attorneys for Defendants Mousa Namvar,
Magdiel, LLC, DGADE of Delaware, LLC,
Namco 8, LLC, Bunherst, LLC, and
Wishlab 90, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over the age of 18 and not a party to the within action; I am employed by GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER LLP in the County of Los Angeles at 1900 Avenue of the Stars, 21st Floor, Los Angeles, California 90067.

On September 23, 2013, I served the foregoing document(s) described as:

NOTICE OF MOTION AND MOTION IN LIMINE OF DEFENDANTS MOUSA NAMVAR, MAGDIEL, LLC, NAMCO 8, LLC, WISHLAB 90, LLC, BUNHERST, LLC, AND DGADE OF DELAWARE, LLC TO EXCLUDE DOCUMENTS NOT TIMELY PRODUCED IN DISCOVERY AND DEPOSITION TESTIMONY REGARDING SUCH DOCUMENTS FROM INTRODUCTION AT TRIAL BY PLAINTIFF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

- ☐ By placing the true copies thereof enclosed in sealed envelopes addressed as stated below.
- ☐ **(BY MAIL)** I placed said envelope(s) for collection and mailing, following ordinary business practices, at the business offices of GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER, LLP, and addressed as shown on the attached service list, for deposit in the United States Postal Service. I am readily familiar with the firm's practice for collection and processing correspondence for mailing with the United States Postal Service, and said envelope(s) will be deposited with the United States Postal Service on said date in the ordinary course of business.
- ☐ **(BY HAND DELIVERY).** On August 8, 2013, I caused said documents to be hand delivered via First Legal to the party listed on the attached service list.
- ☒ **(BY ELECTRONIC SERVICE)** by causing the foregoing document(s) to be electronically filed using the Court's Electronic Filing System which constitutes service of the filed document(s) on the individual(s) listed on the attached mailing list.
- ☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on September 23, 2013 at Los Angeles, California.

/s/ Jan Reinglass
JAN REINGLASS

SERVICE LIST

BY NORCO OVERNITE

Honorable Gary A. Feess
United States District Court
255 East Temple Street, Courtroom 740
Los Angeles, California 90012

SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (“NEF”)

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